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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

WAYNE ESTELLE, WARDEN,

Petitioner,

v.

MARK OWEN McGUIRE,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION SUPPORTING RESPONDENT

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BRIEF FOR *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION SUPPORTING RESPONDENT

INTEREST OF *AMICI CURIAE*

Both the petitioner and the respondent have consented to the participation of the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association as *amici curiae* in this case. Their letters of consent are on file with this Court.

I. National Association of Criminal Defense Lawyers.

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a nationwide membership of more than 5,000 lawyers. The NACDL was founded over twenty-five years ago to promote, study and advance the knowledge of criminal defense law, and to encourage the integrity, independence and expertise of defense lawyers.

Among the NACDL's stated objectives is to promote the proper administration of criminal justice. Consequently, the NACDL is concerned with protecting individual rights and with improving criminal law, its practices and procedures. This organization strives to protect both an individual's Fourteenth Amendment right to a fundamentally fair trial and the ability to enforce this right through the remedy of federal habeas corpus. The NACDL is very concerned about any decision that would undermine or dilute either this constitutional guarantee or the mechanism to enforce the guarantee, as would adopting the position taken by the petitioner in this case.

The *Amicus Curiae* Committee of the NACDL has discussed this case and decided that the issues are so important to defense lawyers and persons accused of criminal offenses throughout the nation that the NACDL should offer its assistance to the Court.

II. National Legal Aid and Defender Association.

The National Legal Aid and Defender Association (NLADA) was formed in 1911 and is a private, non-profit, national membership organization headquartered in Washington, D.C. Its purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. The NLADA represents

approximately 774 defender and assigned counsel offices providing legal services to poor people accused of criminal offenses. The membership of the NLADA comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel and other private practitioners.

The NLADA is vitally interested in protecting the fundamental rights of poor persons accused of crimes. The organization is greatly concerned that narrowing the reach of habeas corpus, as requested by the petitioner in this case, would result in the denial of fundamentally fair trials to many indigent people accused of criminal offenses.

SUMMARY OF ARGUMENT

A central purpose of the Fourteenth Amendment's Due Process Clause is to ensure that every person accused of a crime receives a fundamentally fair trial. Mark McGuire was denied such a trial. He was convicted because of the admission of pure propensity evidence. Every common law jurisdiction has declared that convictions based on propensity evidence are anathema to the fair administration of justice.

The basic legal standard that governs this case is not in dispute. The petitioner, the respondent, and the United States (as *amicus curiae*) all agree that the Due Process Clause guarantees the right to a fundamentally fair state criminal trial. The only real dispute in this case is whether evidence as to propensity was admitted in Mr. McGuire's trial and, if so, whether this evidence as emphasized by an improper jury instruction made the trial fundamentally unfair, in violation of the Due Process Clause.

This brief focuses primarily upon the character rule, which is the common law prohibition against the introduction of pure propensity evidence. The rule is vital to a fair trial; people must be tried for what they do, not who they are. The rule against propensity evidence has been applied consistently in every common law jurisdiction since at least the middle of the seventeenth century, and it has been adopted in each of the United States. The history, prominence, and purpose of the character rule demonstrate that it is fundamental to a fair trial. Therefore, a transgression of the character rule is not merely an error of state law; if the introduction of propensity evidence is sufficiently prejudicial it amounts to a deprivation of a fair trial. The court of appeals found such a constitutional error in Mr. McGuire's case and correctly granted relief.

The constitutional error in this case, the denial of a fundamentally fair trial, is cognizable on habeas corpus. Habeas corpus is the proper remedy for obtaining freedom from imprisonment when defendants, such as Mr. McGuire, have not received a fair trial.

ARGUMENT

I. The Due Process Clause Prohibits Convictions Based upon Propensity Evidence.

A. The Fourteenth Amendment guarantees criminal defendants a fundamentally fair trial.

State criminal defendants are entitled to a fair trial. "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) (citations omitted).[1] To

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[1] *See also Committee Report and Proposal, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Judicial Conference of*

(Continued on following page)

implement this right, rules that are "fundamental and essential to a fair trial" are made obligatory on the states by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), quoting *Betts v. Brady*, 316 U.S. 455, 465 (1942). The Court has held that rules are fundamental when they are central to Anglo-American jurisprudence, as evidenced by the common law tradition, by the Constitution, or by the application of those rules by state and federal courts.

Some fundamental protections are reflected in the Bill of Rights and are made applicable to the states through the Fourteenth Amendment. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to a jury trial); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to a speedy trial); *Malloy v. Hogan*, 378 U.S. 1 (1964) (right against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

This Court has also held, on many occasions, that the Fourteenth Amendment requires certain procedures that are fundamental, though they are not specifically included in the Bill of Rights. For example, in *In Re Winship*, 397 U.S. 358 (1970), the Court invalidated a state statute that allowed minors to be found delinquent based upon a mere preponderance of evidence. The Court found that "[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every [element of the offense]." *Id.* at 365. Similarly, in *Thompson v. Louisville*, 362 U.S. 199 (1960),

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the United States [Powell Committee Report], at 7 (August 23, 1989) ("[t]he fundamental requirement of a criminal justice system is fairness.").

the Court overturned a conviction because the charges against the defendant had no evidentiary support. The Court stated, "[I]t [is] a violation of due process to convict and punish a man without evidence of his guilt." *Id.* at 206 (footnote omitted). *See also Ake v. Oklahoma*, 470 U.S. 68 (1985) (due process requires that certain indigent criminal defendants receive the assistance of a psychiatrist); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (granting writ of habeas corpus because the accused was denied a fair trial due to excessive publicity); *Turner v. Louisiana*, 379 U.S. 466 (1965) (violation of due process because two key witnesses were deputy sheriffs who doubled as bailiffs during the trial); *Mooney v. Holohan*, 294 U.S. 103 (1935) (conviction on the basis of knowingly perjured testimony denies due process); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (trial before a judge who has an interest in the matter violates the Due Process Clause).

The Due Process Clause of the Fourteenth Amendment guarantees a fundamentally fair trial to each person accused by the state of a crime. A state court can deny a defendant a fundamentally fair trial by violating procedures explicitly provided in the Bill of Rights and incorporated in the Fourteenth Amendment. In addition, a state can infringe an accused person's right to a fundamentally fair trial by failing to abide by procedures that are not explicit in the Constitution, but that are nevertheless fundamental to the fair administration of justice.

B. The character rule is fundamental to a fair trial.

Evidentiary rules that are deeply rooted in the common law tradition can be fundamental to a fair trial. *Brinegar v. United States*, 338 U.S. 160, 174 (1949). So it is

with the principle prohibiting the introduction of evidence of criminal disposition, commonly called the "character rule." The rule has been firmly and consistently applied since the middle of the seventeenth century. The character rule is embodied in Federal Rule of Evidence 404 and in section 1101 of the California Evidence Code. Every single state has adopted a similar or identical rule, either by statute or through case law. The rule also prevails in other common law countries. Violation of the character rule can deny a defendant due process of law.

The character rule "disallow[s] resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." *Michelson v. United States*, 335 U.S. 469, 475 (1948) (footnote omitted). Character evidence is always excluded, except where particularly probative to show intent, identity, malice, motive, *modus operandi* or an element of the offense. *See Spencer v. Texas*, 385 U.S. 554, 560-1 & n.7 (1967) (discussing evidence of prior crimes, a form of character evidence). Character evidence may also be introduced when the defendant makes it an issue, or when the state attempts to impeach the defendant's credibility. *Id.* Other than these circumstances, character evidence is not admissible; people are tried for what they do, not who they are. *See Boyd v. United States*, 142 U.S. 450 (1891) (overturning a murder conviction because court admitted evidence of several robberies that were not related to the murder charge).

The character rule is essential to a fair trial. To determine whether a rule is essential to a fair trial, the Court often examines the history of the rule and whether it is universally applied. In *Brinegar v. United States*, 338 U.S. 160 (1949), the Court emphasized this principle, stating,

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystalized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

Id. at 174; *see also In Re Winship*, 397 U.S. at 362, quoting *Brinegar*. Further, near universal adherence to a rule "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Winship*, 397 U.S. at 361-62, quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). For example, the Court in *Pacific Mutual Life Insur. Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032, 1041-43 (1991), found that imposing reasonable punitive damages does not violate the Due Process Clause because those damages are deeply rooted in Anglo-American law and are universally applied by state and federal courts. *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986) (sodomy not protected by Due Process Clause because it is not deeply rooted in American jurisprudence).

The character rule is an essential attribute of Anglo-American jurisprudence; the rule has been around longer than our country. The character rule was firmly established in England by at least the middle of the seventeenth century. In *Hampden's Trial*, 9 How. St. Tr. 1053, 1103 (K.B. 1684), Justice Withins recalled a prior case in which the court forbade use of evidence of "any other forgeries, but that for which [the accused] was indicted." In *Harrison's Trial*, 12 How. St. Tr. 834 (Old Bailey 1692), the defendant was on trial for murder. A witness was called to testify about some prior wrongful act of the

defendant, but the Lord Chief Justice refused to allow the testimony, stating, "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter." *Id.* at 864. *See also Regina v. Oddy*, 169 Eng. Rep. 499, 502 (Cr.Cas.Res. 1851) (accused was on trial for possession of stolen property; as per Lord Chief Justice Campbell, evidence of defendant's possession of other stolen property was not admissible); S. M. Phillipps, *Law of Evidence* 170 (1824) (evidence of prior acts not admissible to show criminal disposition). A primary reason for this rule is to ensure that the accused is not found guilty merely because a jury might think that he or she is likely to have committed a crime. *Regina v. Oddy*, 169 Eng. Rep. at 502 ("evidence of the prisoner being a bad man, and likely to commit the offences there charged" is inadmissible).

Early American courts recognized the importance of the character rule. The Massachusetts Bay Colony's Superior Court of Judicature applied the rule in *Rex v. Doaks*, Quincy's Mass. Reports 90 (Mass. Super. Ct. 1763). Doaks was indicted for keeping a "Bawdy House." The court excluded evidence of former acts of lasciviousness, and of the defendant's "general ill Character." *Id.* at 91. The same principle was applied by American courts in the nineteenth century. *See Boyd*, 142 U.S. at 454-58; *Commonwealth v. Jackson*, 132 Mass. 16, 20 (1882) (Devens, J.); *Commonwealth v. Hardy*, 2 Mass. 302, 317 (1807) (Parsons, C.J.).

The character rule now prevails in every state and in the District of Columbia. Thirty-eight states have codified the common law character rule by adopting an evidentiary rule identical or similar to Federal Rule of Evidence

404.[2] These states are Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.[3] The

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[2] Federal Rule of Evidence 404 provides:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[3] *See* Alaska Evid. Code § 404; Ariz. Evid. Code § 404; Ark. Ct. R. 404; Cal. Evid. Code § 1101 (West 1991); Colo. Evid. Code § 404; Del. R. Evid. 404; Fla. Evid. Code § 90.404; Haw. R. Evid.

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District of Columbia and the remaining twelve states, Alabama, Connecticut, Georgia, Illinois, Indiana, Maryland, Massachusetts, Missouri, New York, Pennsylvania, South Carolina, and Virginia, also prohibit the admission of character evidence to show criminal propensity, but have adopted this rule through case law.[4]

Other common law countries and territories have adopted the character rule. They include Australia,

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404; Idaho Ct. R. 404; Iowa R. Evid. 404; Kan. R. Civ. P. 60-447; Ky. R. Evid. 404; La. Code Civ. Proc. Ann. art. 404 (West 1990); Me. R. Evid. 404; Mich. R. Evid. 404; Minn. R. Evid. 404; Miss. R. Evid 404; Mont. R. Evid. 404; Neb. R. Evid. 404; Nev. Rev. Stat. Ann. § 48.045 (Michie 1986); N.H. R. Evid. 404; N.J. R. Evid. 47; N.M. Stat. Ann. § 11-404 (1978); N.C. Gen. Stat. § 8c-1, Rule 404 (1990); N.D. R. Evid. 404; Ohio R. Evid. 404; Okla. C. Civ. P. 2404; Or. R. Evid. 404; R.I. R. Evid. 404; S.D. R. Evid. 404; Tenn. R. Evid. 404; Tex. R. Evid. 404; Utah R. Evid. 404; Vt. R. Evid. 404; Wash. R. Evid. 404; W. Va. R. Evid. 404; Wis. R. Evid. 904.03; Wyo. R. Evid. 404.

[4] *See Artis v. United States*, 505 A.2d 52, 56 (D.C. App. 1986), *cert. denied*, 479 U.S. 964 (1986); *Anonymous v. State*, 507 So.2d 972, 973-74 (Ala. 1987); *State v. Holliday*, 159 Conn. 169, 268 A.2d 368 (1970); *Brown v. State*, 197 Ga. App. 155, 398 S.E.2d. 34 (1989); *People v. Kannapes*, 208 Ill. App. 3d 400, 567 N.E.2d 377, 380 (1990); *Penley v. State*, 506 N.E.2d 806, 808 (Ind. 1987); *Ross v. State*, 276 Md. 664, 669-70, 350 A.2d 680, 684 (1976); *Commonwealth v. Chalifoux*, 362 Mass. 811, 815-16 (1973); *State v. Clark*, 801 S.W.2d 701, 703 (Mo. 1991); *People v. Powell*, 543 N.Y.S.2d 818, 819, 152 A.D.2d 918 (1989); *Commonwealth v. Lark*, 518 Pa. 290, 543 A.2d 491, 497 (1988); *State v. Griffin*, 277 S.C. 193, 285 S.E.2d 631, 633 (1981); *Brooks v. Commonwealth*, 220 Va. 405, 407, 258 S.E.2d 504, 506 (1979).

Canada, England, Ireland, the Philippines, Puerto Rico, and the Virgin Islands.[5]

The rule against character evidence is thus essential to the very concept of justice in our country and in other countries that adhere to the common law tradition. The rule is vital to a fundamentally fair trial[6]

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[5] *See R. v. Knape*, 1965 V.R. 469, 472 (Vict. 1965); *Sweitzer v. The Queen*, 1 S.C.R. 949, 952-5 (Can. 1982); *Beggs*, 90 Crim. App. R. 430, 434-35 (Eng. 1990); *People v. Bond*, 1966 I.R. 214, 223 (Ir.C.C.A. 1966); *People v. Asinas*, 53 P.I. 59, 67-8 (Phil. 1929); P.R. Laws Ann. tit. 32, app. IV, rule 20 (1980); V.I. Code Ann. tit 5, § 887 (1967).

[6] Because the character rule has been adopted in every state and acknowledged by this Court, the retroactivity bar of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion) has no possible application here. In *Teague*, the Court held that a "new rule" will not be announced for the first time on habeas corpus unless the absence of the rule "undermine[s] the fundamental fairness that must underlie a conviction or seriously diminish[es] the likelihood of obtaining an accurate conviction." *Id.* at 310, 315. A new rule is one which "breaks new ground or imposes a new obligation upon the States or the Federal Government." *Id.* at 301 (citations omitted).

First, the prohibition against the introduction of propensity evidence does not break new ground; it has been consistently applied for hundreds of years and has been adopted in every state. Moreover, contrary to a claim in one of the *amicus curiae* briefs (Brief of Criminal Justice Legal Foundation at 28-30), this Court has recognized the character rule. *See, e.g., Boyd v. United States*, 142 U.S. 450 (1892). Second, the rule fits within both exceptions to *Teague*. Absence of the character rule would undermine the fundamental fairness of a trial and would diminish the likelihood of obtaining an accurate conviction.

It is worth noting that neither the petitioner nor the United States claim that *Teague v. Lane* has any relevance to this case.

C. Introduction of propensity evidence can make a trial fundamentally unfair.

All of the parties agree on the legal standard that governs this case: a person accused of a crime is denied due process by the trial court's "failure to observe that fundamental fairness essential to the very concept of justice . . . [where] the absence of that fairness fatally infect[s] the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba v. California*, 314 U.S. 219, 236 (1941); Petitioner's Brief at 42 (quoting *Lisenba*); Brief for the United States at 12-13 (same). Propensity evidence can fatally infect a trial with unfairness. The State agrees with this point as well: "[T]he improper introduction of evidence or an incorrect jury instruction might in some cases, result in the denial of due process . . . ." Petitioner's Brief at 14-15.[7] This is just such a case.

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[7] Never has this Court denied that a violation of the character rule can deprive an accused of fundamental fairness and due process. For example, in *Spencer v. Texas*, 385 U.S. 554 (1967), this Court held that the introduction of certain documentary evidence of prior criminal convictions did not result in fundamentally unfair trials. Character evidence was introduced in three separate trials to enhance the defendants' punishments, based upon an admittedly proper state recidivist statute. *Id.* at 557. The juries in those cases were specifically instructed that the prior act evidence could be considered only with respect to punishment, and not for proof of guilt. *Id.* at 559. In the Supreme Court, the petitioners argued that the juries were not capable of following the instructions; the petitioners claimed that conducting the guilt and punishment phases of the trials together (rather than bifurcating the two stages) made their trials fundamentally unfair. *Id.* at 563. This Court ruled that the evidence was admitted for a proper purpose and that the juries were presumed to have followed the

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This Court has long recognized that character evidence can inflame jurors' passions, result in unfair surprise, and unfairly prejudice a person accused of a crime. In *Boyd v. United States*, 142 U.S. 450 (1892), the Court held evidence of other crimes inadmissible. As the first Justice Harlan wrote for the Court,

> Proof of [other crimes] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules proscribed by law for the trial of human beings . . . .

Id. at 458. In *Michelson v. United States*, 335 U.S. 469, 475-76 (1948), the Court held that "[t]he state may not show defendant's prior trouble with the law . . . not . . . because character is irrelevant; on the contrary it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (Footnote omitted). *See also Spencer v. Texas*, 385 U.S. 554, 570 (1966) (Warren, C.J., dissenting) ("the use of prior-convictions evidence in these cases is fundamentally at odds with traditional notions of due process . . . because it needlessly prejudices the accused without advancing any legitimate interest of the State" *Marshall v. United States*, 360 U.S. 310, 312 (1959) (reversing a conviction because the jury was exposed to news

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instructions. *Id.* at 566. Thus, *Spencer* merely represents one instance in which a form of character evidence was properly introduced.

reports of the defendant's prior convictions, "evidence of a character which the trial court ruled was so prejudicial it could not be directly offered into evidence").[8] Given its potential to cause extreme prejudice, it is clear that propensity evidence can fatally infect a state criminal defendant's trial with unfairness.

Accordingly, the courts of appeals recognize this potential for prejudice. The Third, Fifth, Sixth, Seventh and Eleventh Circuits, in addition to the Ninth Circuit, have properly granted habeas corpus relief where state evidentiary errors have resulted in fundamentally unfair trials. *See Bisaccia v. New Jersey*, 623 F.2d 307 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980) (reversing the denial of a habeas corpus petition because the prejudicial effect of evidence might have risen to such a magnitude as to deny fundamental fairness); *Panzavecchi v. Wainwright*, 658 F.2d 337, 341 (5th Cir. Unit B 1981) (granting habeas corpus petition because prejudice from character

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[8] Benjamin Cardozo, writing as Chief Justice of the New York Court of Appeals, framed the issue rather well:

> There may be some cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of a milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. "The natural and inevitable tendency of the tribunal – whether judge or jury – is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." Wigmore, *Evidence* vol. 1, § 194, and cases cited.

People v. Zackowitz, 254 N.Y. 192, 198, 172 N.E. 466, 468 (1930).

evidence "rose to such a level as to make petitioner's trial fundamentally unfair and in violation of the Fourteenth Amendment"); *Walker v. Engle*, 703 F.2d 959 (6th Cir.), *cert. denied*, 464 U.S. 951 (1983) (granting petition for writ of habeas corpus because evidentiary error resulted in fundamentally unfair trial); *Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989) (granting habeas corpus relief because prejudical effect of evidence so outweighed probative value that the result was a denial of due process); *Osbourne v. Wainwright*, 720 F.2d 1237 (11th Cir. 1983) (reversing the denial of habeas corpus petition because prejudical effect of evidence might have risen to such a magnitude as to deny fundamental fairness).

As these cases demonstrate, the circuits follow the basic test described in *Lisenba v. California*. There is no disarray among the circuits in the application of the *Lisenba* standard. The only question for the district courts and the courts of appeals is whether, on the facts of each individual case, an accused person was denied a fundamentally fair trial.[9]

Of course, federal courts do not, and should not, remedy every evidentiary error in every state criminal proceeding. That much was made clear in *Spencer v. Texas*, 385 U.S. 554, 562 (1967) (noting that federal courts do not

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[9] The Ninth Circuit has no difficulty recognizing that state court errors only rise to the level of a constitutional violation in very unusual circumstances, such as the present case. *See Jammel v. Van De Kamp*, 926 F.2d 918 (9th Cir. 1991) (denying petition for writ of habeas corpus because error did not result in a fundamentally unfair trial); *Kealohapauole v. Shimoda*, 800 F.2d 1463 (9th Cir. 1986), *cert. denied*, 479 U.S. 1068 (1987) (same); *Butcher v. Marquez*, 758 F.2d 373 (9th Cir. 1985) (same).

promulgate state rules of procedure). But, in the rare event that an egregious evidentiary error denies the accused a fundamentally fair trial, the federal court must remedy the constitutional violation.

II. Mr. McGuire Was Denied a Fundamentally Fair Trial, and The Court of Appeals Properly Granted Relief.

A. The court of appeals granted relief because of a violation of the United States Constitution.

California, like every other of the United States, has formulated its own version of the character rule. California's version of the rule is contained in section 1101 of the California Evidence Code. That California has codified its own version does not, however, convert the issue of admission of character evidence into solely a question of state law. If the admission of propensity evidence renders a trial fundamentally unfair, federal rights have been denied. The Court articulated this principle in *Lisenba v. California*, 314 U.S. 219 (1941), stating,

> The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce, such [evidentiary] rule as she elects, whether it conform[s] to that applied in the federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence.

Id. at 236.

Furthermore, the United States Constitution is the "supreme Law of the Land; and the Judges in every state [are] bound" by it. U.S. Const. art. VI, cl.2. Thus, a state

law can never preempt the Constitution. Accordingly, although states are free to enact procedural rules to protect constitutional rights, if, in a particular case, the law fails to provide due process, the accused may still assert a violation of the underlying right.

In this case, the court of appeals found a violation of that underlying constitutional right, and not merely an error of state law. The petitioner asserts that the court of appeals "misinterpreted" state law. *See* Petitioner's Brief at 19-24. This argument misperceives the court's opinion. To be sure, the federal court of appeals cited state law in discussing "battered child syndrome" evidence and the character rule. *McGuire v. Estelle*, 902 F.2d 749, 753-54 (9th Cir. 1990); J.A. 107-09. The court also cited Federal Rules of Evidence 401 and 404. *Id.* Simply because the court looked to familiar signposts to articulate the character rule does not indicate, however, that the court's decision hinged on a strict interpretation of those cited rules. The court of appeals unmistakeably concluded that a constitutional violation had occurred: "[T]he aggregate effect of the admittance of irrelevant, highly prejudicial evidence, compounded by the trial court's instruction to use that evidence in the most prejudicial manner possible, rendered [Mr. McGuire's] trial arbitrary and fundamentally unfair." *Id.*, 902 F.2d at 753; J.A. 106.

Under *Lisenba* and the Supremacy Clause, the federal court acted within its authority and as required by the Constitution in determining that the admission of evidence of alleged prior conduct of Mr. McGuire, although held admissible by state courts, violated Mr. McGuire's right to a fair trial.

B. Admission of propensity evidence denied Mr. McGuire a fundamentally fair trial.

Mark McGuire was convicted because pure propensity evidence was introduced at his trial. The prosecutor used two types of propensity evidence in the trial, and neither type was relevant to any proper issue in the case. First, the prosecutor introduced testimony of other injuries sustained by Tori McGuire. This evidence was unnecessary to establish lack of accident, because no defense of accident was raised. Furthermore, the state's own expert was prepared to testify about "battered child syndrome" and the lack of an accident, without relying at all upon the previous acts or injuries. The prosecutor also introduced inflammatory evidence of Mr. McGuire's supposed violent disposition. As if this were not enough, the prejudice caused by this propensity evidence was exacerbated by the trial judge's instructions to the jury. The trial judge told the jury that it could infer that because Mr. McGuire supposedly had a violent disposition, he was the person who killed Tori. The prosecutor's use of propensity evidence in this case significantly departed from historical practice and denied Mr. McGuire a fundamentally fair trial.

The first category of propensity evidence, the category that has received the most attention in this case, is the evidence of prior injuries. None of this evidence was necessary to establish "battered child syndrome." Dr. Levine made her diagnosis before she was even aware of the prior rib injuries; those prior injuries merely "confirmed" her diagnosis. [RT 92]. There was no challenge to the validity of the "battered child syndrome" diagnosis,

and hence there could be no need to reinforce the diagnosis by reference to injuries that would only serve to prejudice Mr. McGuire.

Nor was this evidence introduced to show absence of an accident. The prosecution, not the defense, introduced the alleged prior statement about accidental harm – that the baby fell off the couch. Surely the state cannot be permitted to raise the possibility of an accident and then introduce prejudicial propensity evidence to rebut the issue the prosecution itself has raised. If the Court has any doubt about the real reason why this evidence was admitted, the Court need not look beyond the prosecutor's own statements to the trial judge:

> MR. PLATT [Prosecutor]: The jury can infer[,] from the existence of the broken rib[,] identification, it is like you may not see the brick layer making a wall, lay the first brick, but if you see him laying the thirty seventh, it is a fair inference that he is the one who laid the first one, the fifth one, the fifteenth one, especially if there is no one else around.

[RT 647; J.A. at 34].[10]

Furthermore, the petitioner cannot circumvent the character rule merely through the incantation that the prior injury evidence was relevant to a medical diagnosis. The diagnosis must itself be tied to a proper issue in the case. No one except the prosecution ever suggested at trial that Tori McGuire died by accident. Given that this

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[10] The prosecutor had previously denied that this evidence was relevant to identity. He stated that "[w]e do not maintain that the battered child syndrome addresses itself to the identity of the perpetrator. We maintain as a diagnostic devise [sic] period. I am not looking to identify anybody through risk factor testimony." [RT 70; J.A. at 16].

issue was uncontested, even the "battered child syndrome" diagnosis had limited relevance.

The second category of propensity evidence was the testimony about Mr. McGuire's alleged prior acts and threats. The prosecution went so far as to establish that Daisy McGuire had once sought information about a battered women's shelter, [RT 499], and that she would not go home with Mr. McGuire on one occasion until he promised in writing "to treat Daisy good" and "to stop all bad habits and be a responsible husband." [RT 361-62]. Defense counsel repeatedly objected, telling the trial judge that this category of evidence improperly went to disposition. [RT 234-40]. Indeed, the prosecutor's own statements demonstrate that the evidence was offered to prove that Mr. McGuire had a violent disposition and that, as between Mr. and Mrs. McGuire, he was more likely to have killed Tori. The prosecutor stated to the trial court, in urging that this category of propensity evidence be admitted:

> MR. PLATT: [H]is violent propensity with respect to the family setting with[in] which this crime occurred are germane to show he and not Daisy is the aggressor. Daisy is the passive, the typically passive parent . . . Mr. McGuire is the aggressor. He did it. Not Daisy, not some mysterious Mexican. We are entitled to show that just as we are entitled to show previous injuries to the child . . . .

[RT 237]. There could be no proper purpose for this evidence. This was pure propensity evidence, for the testimony was relevant to identity only through the forbidden link of criminal disposition.

The judge's instructions to the jury magnified the prejudicial effect of this propensity evidence. The charge

to the jury was based upon a pattern instruction, *California Jury Instructions – Criminal* [CALJIC] 2.50 (4th ed. 1979). The jury was told that it could find Mr. McGuire guilty if it logically concluded that he committed the other acts. *McGuire v. Estelle*, 902 F.2d at 755, J.A. at 112. Hence, as the court of appeals found, "[t]he trial court *instructed* the jury to use that [propensity] evidence in the most improper way possible." *Id.*, 902 F.2d at 754, J.A. at 110 (emphasis in original). The pattern jury instruction has since been corrected, and the offending paragraph has been entirely deleted.[11] Of course, while California has amended the faulty pattern instruction, the correction comes too late to help Mr. McGuire.

The propensity evidence was introduced without any proper purpose, which is a clear departure from the historical common law character rule. Absent the evidence, Mr. McGuire would not have been convicted. Without the improper testimony, the case against Mr. McGuire was weak: no eyewitnesses testified that Mark McGuire inflicted the fatal blows, and Daisy McGuire confessed at trial to hitting Tori shortly before the child's death. The court of appeals wrote that "only the barest threads connect McGuire to the crime." *McGuire v. Estelle*, 902 F.2d at 755, J.A. at 113. The jury was instructed to

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[11] CALJIC 2.50 has been revised several times since Mr. McGuire was tried. The comments to an intermediate revision explain that the offending language was deleted in response to a case from the California Supreme Court, *People v. Tassell*, 36 Cal.3d 77, 679 P.2d 1 (1984). *See CALJIC Pocket Part For Fourth Edition* § 2.50, Comments (January 1987). The new instruction is CALJIC 2.50 (5th ed. 1988). It is carefully drafted to prevent a jury from convicting an accused person on the basis of pure propensity evidence.

consider the character evidence in the most harmful fashion. Hence, the effect of the improper propensity evidence must have been "to so overpersuade [the jury] as to prejudge one with a bad general record and deny him a fair opportunity to defend against [the] charge." *Michelson v. United States*, 335 U.S. at 475-76. Under the circumstances of this case, the absence of fundamental fairness "fatally infected" the trial, within the meaning of *Lisenba v. California*. The State denied Mr. McGuire a fundamentally fair trial, and therefore violated the Due Process Clause.

III. Habeas Corpus Is The Proper Remedy For The Denial of A Fundamentally Fair Trial.

The court of appeals granted Mr. McGuire's petition for writ of habeas corpus, finding that he was denied a fundamentally fair trial. At its heart, the debate in this case is not about the proper role of habeas corpus, for this Court has repeatedly held that federal habeas corpus will remedy the denial of fundamental fairness in a state criminal trial. It is important to make clear that the use of the writ in this case is fully in accord with a settled function of habeas corpus, which is protecting against arbitrary imprisonment and unfair trials.

Habeas corpus *ad subjiciendum* – the "Great Writ" – has traditionally served as the basic mechanism to challenge unlawful confinement. At common law it commanded the custodian to produce the body of a prisoner, together with the reasons for his or her detention, and to "submit to, and receive, whatsoever the judge or court awarding the writ shall consider in that behalf." 3 W. Blackstone, *Commentaries on the Laws of England* 131 (1791). In the seventeenth century, Parliament repeatedly

affirmed the role of habeas corpus. Parliament passed the Habeas Corpus Act of 1641, 16 Car. I, ch. X, par. vi (the court may issue a writ demanding that the custodian "certifie the true cause of such his deteinor or imprisonment;" the court must then "proceed to examine and determine whether the cause of such commitment . . . be just or legall or not and shall thereupon do what to justice shall appertaine") as well as the Habeas Corpus Act of 1679, 31 Car. II, ch. II.

English courts granted writs of habeas corpus in appropriate circumstances. In the celebrated *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), habeas corpus was utilized to free former jurors from custody. A judge had held the jurors in contempt after they returned not guilty verdicts in the tumultuous and unlawful assembly trial of William Penn and William Mead. *Id.* at 1007. The jurors sought release on habeas corpus. The court noted that "[t]he writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been again the law deprived of it." *Id.* The jurors' imprisonment was deemed to be without cause, *id.* at 1009, and they were discharged from custody.

The role and importance of habeas corpus was recognized in the earliest days of our nation. Habeas corpus is discussed in *The Federalist*.[12] The writ is embodied in the

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[12] *See* No. 83, at 499 (A. Hamilton) (C. Rossiter ed. 1961) ("[A]rbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act . . . both . . . are provided for in the most ample manner in

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United States Constitution. U.S. Const. art. I, § 9, cl. 2 (the Suspension Clause). The Judiciary Act of 1789 only gave the federal courts power to grant writs of habeas corpus for federal prisoners. *See* Judiciary Act of 1789, § 14, 1 Stat. 73, 81-82; *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1845). However, Congress soon realized that our country could not function as a modern nation and speak with a single voice unless federal habeas corpus was extended to state prisoners. Thus, Congress gradually made federal habeas corpus available to persons in state custody, enacting two statutes in the early part of the nineteenth century,[13] and then, during Reconstruction, passing the Habeas Corpus Act of 1867. That Act made federal habeas corpus generally available to state prisoners who are in custody in violation of the Constitution.[14]

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the plan of the convention"); *id.* No. 84, at 511-12 (A. Hamilton) ("The establishment of the writ of *habeas corpus*, the prohibition of [*ex post facto* laws and titles of nobility] are perhaps greater securities to liberty and republicanism than any [provision of the New York constitution]"; habeas corpus is a remedy for the "fatal evil" of "arbitrary imprisonments").

[13] Congress passed The Act of March 2, 1833 ("The Force Act"), ch. 57, § 7, 4 Stat. 634, so that federal habeas corpus would be available to federal tariff collectors imprisoned by state authorities. W. Duker, *A Constitutional History of Habeas Corpus* 187 (1980). The Act of August 29, 1942, 5 Stat. 539, was passed to permit the federal government to intercede in a state criminal prosecution of a foreign agent. *Id.* at 188-89. *See also* J. Liebman, *Federal Habeas Corpus Practice and Procedure* 7 (1988).

[14] Act of February 5, 1867, ch. 28, 14 Stat. 385. The first section of the Act provides that federal courts "shall have power to grant writs of habeas corpus in all cases where any

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In passing the 1867 Act, Congress gave state prisoners complete access to the remedy of federal habeas corpus. Representative Lawrence introduced the bill in the House and stated that it would "enlarge" habeas corpus "and make the jurisdiction of the [federal] courts . . . coextensive with all the powers that can be conferred upon them." He called it "a bill of the largest liberty . . . ." Cong. Globe, 39th Cong., 1st Sess. 4151 (1866) (statement of Representative Lawrence). Senator Trumbull, who introduced the bill in the Senate, stated,

> [A] person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ and we agree that he ought to have recourse to the United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.

Cong. Globe, 39th Cong., 1st Sess. 4229 (1866) (statement of Senator Trumbull). In the earliest case under the 1867 Act, this Court held that "[The Act] is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction." *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1867).

True to an historical role of the writ and consonant with Congress's mandate that federal courts use habeas

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person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . . " The Act is codified, as amended, at 28 U.S.C. sections 2241(c)(3) and 2254(a).

corpus to ensure that federal rights are enjoyed by all, this Court has steadfastly granted petitions for writs of habeas corpus on behalf of defendants denied a fundamentally fair state criminal trial. In *Moore v. Dempsey*, 261 U.S. 86 (1923), five men convicted of murder in the state courts of Arkansas sought a federal writ of habeas corpus. They alleged that their state trials were "only a form," because they were convicted under mob pressure. *Id.* at 87. This Court reversed the dismissal of their habeas corpus petitions, and remanded for the district court to determine whether they were denied fair trials. *Id.* at 92. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), a doctor accused of murdering his wife petitioned for habeas corpus relief from his state conviction in the state courts of Ohio. He alleged that he was deprived of his constitutional right to a fair trial due to massive, pervasive and prejudicial pretrial publicity. *Id.* at 335. This Court agreed, *id*, and granted Mr. Sheppard's petition for writ of habeas corpus. *Id.* at 363. *See also Irvin v. Dowd*, 366 U.S. 717 (1961) (granting habeas corpus where pretrial publicity resulted in an unfair trial in violation of the Fourteenth Amendment).

This Court has also repeatedly granted petitions for writs of habeas corpus where state criminal proceedings have violated rules, essential to the fair administration of justice, which are explicitly enumerated in the Bill of Rights and made applicable to the states through the Fourteenth Amendment. *See, e.g., Ford v. Wainwright*, 477 U.S. 399 (1986) (reversing denial of habeas corpus petition and remanding to determine whether an incompetent prisoner is to be executed, in violation of Eighth and Fourteenth Amendments); *Malloy v. Hogan*, 378 U.S. 1 (1964) (reversing denial of state habeas corpus petition

for violation of Fifth and Fourteenth Amendment right against self-incrimination); *Chessman v. Teets*, 354 U.S. 156 (1957) (reversing denial of habeas corpus petition because state violated Sixth and Fourteenth Amendment right to counsel).

The petitioner claims that this is not an appropriate case for habeas corpus, offering what is essentially a policy argument. The petitioner claims that habeas corpus is a source of friction between state and federal courts and that some state judges do not like having state convictions considered by federal courts. *See generally* Petitioner's Brief at 38-41. Any such friction, if it even exists at all,[15] is entirely beside the point.

This Court cannot abdicate its constitutional and statutory duties merely to avoid upsetting state judges. It may be true that judges in any system, state or federal, do not relish having their decisions considered by a subsequent court or by this Court. Nevertheless, we are a society governed by the rule of law. Among a judge's responsibilities is submitting his or her decisions to scrutiny by others. Under the Supremacy Clause, the Constitution is the law of the land. The federal courts are the final arbiters of federal law. Congress has spoken: federal

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[15] As Justice Blackmun wrote for the Court in *Rose v. Mitchell*, 443 U.S. 545 (1979),

> The confirmation that habeas corpus remains an appropriate vehicle by which federal courts are to exercise their Fourteenth Amendment responsibilities is not likely further to increase " 'friction between our federal and state systems of justice, [or impair] the maintenance of the constitutional balance upon which the doctrine of federalism is founded.' "

Id. at 562, quoting *Stone v. Powell*, 428 U.S. 465, 491 n. 31 (1979) and *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

courts must grant habeas corpus relief if a state prisoner is "in custody in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a).[16] This role of the federal courts is especially important where, as here, the petitioner has been denied a fundamentally fair trial, for "fundamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984); *see also Wainwright v. Sykes*, 433 U.S.

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[16] The existence of habeas corpus in no way disparages the abilities of our state court judges. Our federal courts have the final say in matters of federal law, just like state courts are the final authorities on matters of state law. The Habeas Corpus Act of 1867 simply allows the federal courts to remedy violations of federal rights, a role that this Court has repeatedly filled. In addition, the Act reflects a congressional preference for careful review of claimed violations of fundamental rights; it must be agreed that adding another layer of review increases the likelihood that constitutional error will be found. *See McCleskey v. Zant*, ___ U.S. ___, 59 U.S.L.W. 4288, 4295 (1991) ("[t]he federal writ of habeas corpus overrides all these considerations [of finality and comity], essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition"); *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) (despite any concerns of comity, "[w]e nevertheless afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard . . . "); *see also Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) ("collateral review will frequently be the only means through which an accused can effectuate [certain constitutional rights]"); *Jackson v. Virginia*, 443 U.S. 307, 322 (1979) ("Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1045 (1977) ("redundancy fosters greater certainty that constitutional rights will not be erroneously denied").

72, 96-7 (1977) (Stevens, J., concurring). It would be remarkable for this Court, or any federal court, to ignore a fundamental injustice merely to avoid some imagined discomfort to a state court judge.

The court of appeals' decision in this case is entirely consistent with an historical and central role of habeas corpus. Through the ages, habeas corpus has been used to free prisoners from arbitrary and unlawful confinement. Mr. McGuire's imprisonment is arbitrary and unlawful; he was denied a fundamentally fair trial due to the introduction of evidence of a type universally condemned by common law jurisdictions. Mr. McGuire's habeas corpus petition was properly granted.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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